



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

DEON D. JENKINS,	§	
Plaintiff,	§	
	§	
vs.	§	CIVIL ACTION NO. 0:04-1132-26BD
	§	
SOUTH CAROLINA DEPARTMENT OF	§	
CORRECTIONS et al.,	§	
Defendants.	§	

ORDER ADOPTING THE REPORT AND RECOMMENDATION OF
THE MAGISTRATE JUDGE AND DISMISSING THE ACTION WITHOUT PREJUDICE

This is a Section 1983 action. Plaintiff is proceeding *pro se*. The matter is before the Court for review of the report and recommendation (report) of the United States Magistrate Judge in which he suggests that the action be dismissed without prejudice and, that the dismissal be deemed as a “strike” under the three strikes rule of 28 U.S.C. § 1915(g). The report is made in accordance with 28 U.S.C. § 636 and Local Rule 73.02 for the District of South Carolina.

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight. The responsibility to make a final determination remains with the Court. *See Matthews v. Weber*, 423 U.S. 261, 270 (1976). The Court is charged with making a *de novo* determination of those portions of the report to which specific objection is made, and the Court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge or recommit the matter with instructions. *See* 28 U.S.C. § 636(b)(1).

The Magistrate Judge filed his report on June 3, 2004. Plaintiff filed his objections to the report on June 24, 2004. Although not timely filed, in an abundance of caution and in the interest of justice, the Court has made a review of the objections pursuant to the standards set forth above. The Court is of the opinion, however, that Plaintiff's objections lack merit.¹

Plaintiff's allegations regarding the physical conditions of the prison do not rise to a constitutional violation. Moreover, and contrary to Plaintiff's argument otherwise, Plaintiff's complaints concerning the disciplinary proceedings were already presented to the Court in the action filed by Plaintiff on April 7, 2004, and, thus, will not be addressed again here. Further, it appears that Plaintiff has failed to exhaust his administrative remedies, a requirement before filing an action in this Court.

Accordingly, after a thorough review of the report and the record in this case pursuant to the standards set forth above, the Court adopts the report to the extent that it does not contradict this Order and incorporates it herein. Hence, it is the judgment of this Court that this action must be **DISMISSED** *without prejudice*. Furthermore, since the Complaint is frivolous, the dismissal shall be deemed as a "strike" under the "three strikes" rule of 28 U.S.C. § 1915(g).²

IT IS SO ORDERED.

Signed this 2nd day of May, 2005, in Spartanburg, South Carolina.

s/ Henry F. Floyd
HENRY F. FLOYD
UNITED STATES DISTRICT JUDGE

NOTICE OF RIGHT TO APPEAL

Plaintiff is hereby notified that he has a right to appeal this Order within thirty (30) days from the date hereof, pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure.

¹For a full recitation of the relevant facts of this case, the reader is directed to the "Background" section of the report at pages 2 - 4.

²The Clerk of Court is hereby directed to provide a copy of pages 7-10 of Doc. 5 to Plaintiff.